COURT NO.2

IN THE HIGH COURT OF UTTARANCHAL AT NAINITAL.

A.O. No. 1109 of 2001
(Old No. 496 of 1992)

National Insurance Co. Ltd.
Through its Senior Divisional Manager,
Divisional Office, Allahabad ……. Dependant/Appellant

Versus

1. Shri Kamlesh Kumar S/o Hira Lal, R/o Raja Transport, Kichha, Nainital (Owner of Truck) …Defendant/Respondent
2. Smt. Geeta Arya W/o Late Krishna Arya
3. Mohir (minor son) S/o Late Krishna Arya
4. Priyanka (minor daughter) D/o Late Krishna Arya
5. Jitendra (minor son) S/o Late Krishna Arya.

All are R/o Hospital Compound, Sitar Ganj, Khatima Road, Tehsil Khatima, Nainital. ……..Applicants/Respondents

Date: September 25, 2004

Hon'ble P.C. Verma, J.
Hon'ble B.S. Verma, J.

This appeal has been preferred by the appellant against the judgment an award dated 27.11.1991 passed by Upper District Judge, Motor Accident Claims Tribunal, Nainital ***(in short the Tribunal)*** in Motor Accident Claims Case No. 144 of 1987. The relief claimed by this appeal by the Appellant is to allow the appeal with cost and to set aside the impugned judgment and award passed by the Tribunal. The Appellant is challenging the validity and correctness of the order of the Court below mainly on the grounds that the learned Judge has not taken into consideration the factum that the Insurance Policy filed by the Insurance Company to cover maximum liability of Rs. 1,50,000/-.

Brief facts of the case-given to the appeal are that the accident occurred on 29.03.1987 at about 11:55 P.M. in the night on Kichha River bridge, Kichha District Nainital. On the fateful day, the deceased Shri Krishan Arya was going after attending the Lok Adalat on 29.03.1987 from Nainital in Jeep No.URN-7594 alongwith other employees to Khatima. The jeep was being driven by the Government Driver Shri Gopal Singh Khali alongwith the deceased Shri Krishan Arya, Shri Jagdish Chandra, Peshkar, Shri Mohan Chandra Pant, Clerk and Shri Bahadur Singh, Peon. In the accident, the driver of Jeep Gopal Singh Khali and Peon died on the spot and the deceased Shri Krishan Arya, SDM Khatima and his rider were admitted in Kichha hospital but on 03.04.1987 at about 7:22 P.M., Shri Krishan Arya has died. The claim petition was contested by the Insurance Company and the State of Uttar Pradesh. On the basis of pleadings, the following issues were framed:-

1. Whether the accident took place due to the rash and negligent driving of truck bearing registration No.URN-1785?
2. Whether the accident took place due to rash and negligent driving of Jeep bearing registration No. URN-7594?
3. Whether the claim petition is barred by time?
4. Whether the Insurance Company is not liable to pay the amount of compensation on the grounds alleged in Para-6 of the Additional Pleas of its W.S.?
5. To what amount of compensation and against whom the claimants are entitled?

On the basis of evidence oral and documentary, the Tribunal came to the conclusion that the accident was the result of head on collusion of the Truck No. URN-1785 and Jeep No. URN-7594 which were driven by their drivers rashly and negligently and awarded the compensation against the O.P. No.1 Kamlesh Kumar, owner of the truck and Insurance Company O.P. No. 3 and O.P. No.4, owner of the Jeep for Rs.7,50,000/- It is noteworthy to mention here that the learned Tribunal did not bifurcate the amount between the owners of the truck, jeep and the insurance company, The accident occurred on 29.03.1987. The new Motor Vehicle Act came into force on July 01,1989, At the time of accident, the old act was applicable and liability of Insurance Company was Rs.1,50,000/- on the date of accident. We find force in the contention of the application that under the old act, the liability of the Insurance Company was limited. In view of the judgment, the New Act could not be applied and in view of the Hon'ble Apex Court in the case of ***"Maitri Koley & Anr. Vs. New India Insurance Co. & Ors,{2003} Supreme Court Cases, 713}, Motor Vehicles Act, 1939 under Section 95 (2)- in (Para-5) Tribunal awarded compensation of Rs.1,50,000/- with interest and restricted liability of Insurance Company to Rs.50,000/- In 1982 Section 95 (2) had been amended to increase liability of Insurance Company to Rs.1,50,000/- - Insurance Company was laible to satisfy award upto Rs.1,50,000/-***

Notices were issued to the parties but nobody has come.

Admittedly, the accident had occurred on 29.03.1987. The provision of the Motor Vehicles Act, 1988 (New Act) could not be applied and on the relevant date, the liability of the insurance company of the Insurance Company was limited to the extent of Rs. 1,50,000/- but the tribunal has committed error in not bifurcating the amount of compensation between eh Insurance Company as well as the owners of the vehicle.

The Apex Court in the case of National Insurance Company Ltd. Vs. Keshav Bahadur and Others reported in 2004 Volume-2, SCC, Page 370 has held that ***"The liability of the insure is limited as indicated in Section 95 of the Act. But it is open to the insured to make payment of additional higher premium and for the insurer to accept higher risk covered in respect of third party also. But in the absence of any such clause in the insurance policy, and proof of payment of additional premium, the liability of the insurer cannot be unlimited in respect of third party and it is limited only to the statutory liability".***

In the of New India Assurance Co. Ltd. Vs. C.M. Jaya & others also, the Supreme Court in **"Liability of Insurance in respect of third-party risk- Limit of –Insurance Policy not taking any higher liability by accepting a higher premium for payment of compensation to the third party** ***–It was held that the insurer, held liable only to the extent limited under S.95 (2) and not liable to pay the entire amount of compensation".***

We have perused the Section 95(2) (b) (i) of the Motor Vehicle Act, 1939. The liability of the Insurance Company was

limited upto Rs.50,000/- till 1982 and thereafter it became Rs. 1,50,000/- by way of amendment. The tribunal did not consider the said contention of the insurer while recording the finding regarding the legality of the limited liability.

In view of the Apex Court judgment in the Old Motor Vehicle Act, 1939 under Section 95- Liability of insurer in respect of the Third Party Risk in limited in absence of any specific agreement undertaking liability in excess of the statutory limit and payment of additional premium. Therefore, insurers liability would be confined to that provided in the statue.

In view of the said Apex Court judgment, we hereby allow the appeal and only on the point of limited liability. Rest of the finding is undisturbed.

We direct the learned Trial Court to bifurcate the amount between the O.P.No.1, 3 and 4 after hearing the Insurance Company as well as the owner of the vehicle in view of the said judgments.

No order as to costs. Amount, if deposited in the appeal, shall be remitted to the Tribunal concerned within a period of three months.

(B.S. Verma, J.) **(P.C. Verma, J.)**

Rajeev Dang